Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

REPLY COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF PAUL D. S. EDWARDS

General Reply Comments

Nearly every comment on the Edwards Petition expresses a common theme – both the commenters urging denial of the Petition, and those urging that it be granted:

> If I do not want a company I do business with to call me on my cell phone, I will tell them so...

Or another:

> If I want to limit the company from my mobile phone as a communication channel, I will notify them myself.

See also, Comments of the DMA, at 3 ("If a consumer wishes not to be contacted at a number assigned to their wireless service, they can communicate that preference to a business."); *Comments of Soundbite Communications*, at 4 ("A consumer who does not wish to receive calls from a creditor on a number he or she has ported to a wireless service can simply contact the creditor to so declare."); *Comments of United States Telecom Association*, at 4. ("When a customer no longer wishes to be contacted at the number provided to the creditor, the customer, at any time, can direct the creditor not to use that number.")

This would be a nice idea – if one could determine the identity of the caller. As many of the 50,000 comments in this docket show, ***debt collectors – illegally – refuse to identify***

themselves in their prerecorded calls.[1] When the calling party does not identify itself, it is impossible to tell them to stop or take any other action. This is one reason that the TCPA and the Commission's rules require – without exception and without exemption – all prerecorded calls to have proper identification of the caller in the message.

The Edwards Petition seeks to prevent the erosion of TCPA protections. The goal of the debt collection industry comments urging denial of the Edwards Petition is to expand the sphere of what constitutes "express consent" to make prerecorded calls to cell phones. However, the prerecorded calls that debt collectors make are the kind of calls that lack proper identification of the caller – hence it is impossible to terminate that express consent with a robot. There is no exception – be it express permission or otherwise – that permits ***any*** prerecorded telephone call to be made without proper identification of the caller. The fact that the industry seeks denial of the Edwards Petition when the calls they want to make are illegal, shows quite clearly which side of this debate holds the legal and moral high ground.

Given that these illegal anonymous calls are the types of calls that will proliferate if the Edwards Petition is denied, the choice faced by the Commission is whether the burden should be 1) on the consumer to stop the calls despite the fact that the calls lack proper identification (deny the Petition), or 2) on the caller, to first call with a live person to obtain real express consent to make subsequent prerecorded calls (grant the Petition).

US Telecom and Sprint claim that "a customer that 'cuts the cord' would likely expect the equivalent service - and to continue to receive the same calls as before - just on a different

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[1] The Commission noted in 1992 that to the extent that debt collection calls are not solicitation, they are not subject to the "live call" identification requirements in 47 C.F.R. 64.1200(d) (formerly 47 C.F.R. 64.1200(e)). *In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd. 8752 at ¶39 (1992). This determination has been intentionally misread by the debt collection industry to be an exemption from 47 C.F.R. 64.1200(b) and 47 U.S.C. § 227(d).

network." This is untrue. Consumers expect something quite different with a wireless phone. They know that they are more private and not in directory services. They know they are not in the white pages and thus not subject to numerous privacy-invading "reverse lookup services." They expect not to get telemarketing calls on them. The law provides greater protections of cell phones, and restricts calls to cell phones. Consumers have a right to expect that others will obey the law, so the expectation that they will receive fewer calls and only lawful calls to a ported number is the norm.

Some industry comments have claimed it is impossible to know which numbers are cell phone numbers.[2] The Commission has already addressed this issue dispositively:

> [W]e expect debt collectors to be able to utilize the same methods and resources that telemarketers have found adequate to determine which numbers are assigned to wireless carriers, and to comply with the TCPA's prohibition on telephone calls using an autodialer or an artificial or prerecorded voice message to wireless numbers.

In re Rules and Regulations Implementing the TCPA, 23 FCC Rcd. 559 at ¶14 (2007) (Order on Request of ACA International for Clarification and Declaratory Ruling). As the Commission is well aware, databases exist for precisely this purpose that the teleservices industry already uses with great success.

The industry comments on the Edwards Petition also create a false dichotomy – intimating that if the Petition is granted, they would never be able to ever call a cell phone again and debt collections would come to a screeching halt *en masse*. As the Commission is well aware, even if the Edwards Petition is granted, debt collectors can still call a cell phone with a

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[2] *See, e.g., Comments of CBE Group* at 8. ("[T]here is no way that the caller would know or be informed that the telephone number has been ported by the consumer to a cellular telephone or otherwise absent prior notice of the same.")

human being rather than a robot, and be in full compliance with the TCPA (as long as all other provisions are followed).

"Implied" consent does not equal "express" consent.

Nearly all of the industry commenters urging denial of the Edwards Petition argue that "the porting of a phone number from one place to another is a consumer decision that *implies* continued consent to be called at that number."[3] (Emphasis added) This assertion fails because the TCPA requires "express" consent to be called on a wireless number, and any "implied" consent is insufficient as a matter of law. The Commission has previously refused to create "implied" consent where the TCPA requires "express" consent. *In re Rules and Regulations Implementing the TCPA*, 18 FCC Rcd. 14,014 at ¶172 (hereinafter "*2003 TCPA Order*"). The same result should be reached here.

In fact, when the courts have addressed this question in similar contexts under the TCPA, they have rejected the notion. *See, e.g., Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365, 394 (Tex. App.2004) ("permission [would be] based on an inference, and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express."); *Leckler v. CashCall, Inc.*, 554 F. Supp. 2d 1025, 1029–30 (N.D. Cal. 2008) ("it impermissibly amends the TCPA to provide an exception for "prior express *or implied* consent" and flies in the face of Congress' intent.") *vacated on other grounds*, 2008 WL 5000528 (N.D. Cal. Nov.21, 2008) (emphasis in original).

Granting the Edwards Petition is not a "retreat" – it merely clarifies an ambiguity in the

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[3] This phrase or similar language is found in well over 200 of the comments on the Edwards Petition. *See also, CBE Group* at 7 ("[I]t is absolutely reasonable to assume" that the consumer who ports a telephone number consents to automated calls at that number.)

prior language of the Commission's commentary and does so in a manner that respects the statute's plain language and salutary purposes of the TCPA.

Finally, as a citizen and a consumer, I am insulted by the industry comments invoking the current financial exigency affecting this country as justification for denying the Petition. Intimating that consideration of our country's economic well-being militates in favor of denying the Petition in order to "reduce costs" to the industry is offensive. If the industry truly wants to contribute to the economic recovery, they should take a bite out of unemployment and hire some *humans* to make the calls instead of using robots.

Reply to the comments of CBE Group, Inc.

CBE Group engages in some fanciful misdirection and takes extreme liberties with the statute and its legislative history. CBE Group claims that "[l]egislative intent suggests that the TCPA was enacted to regulate telemarketing activities and protect consumers from solicitations that cost the consumer money or imposed upon the consumers at peculiar or inconvenient times."[4] This is disingenuous at best. True, the TCPA was – in part – intended to address marketing practices and cost shifting.[5] But it was also intended to address "automated" telephone practices ***regardless*** of whether or not they involved solicitations. This is evident not only in the legislative history, but from the text of the statute. It would be hard to characterize the prohibition on automated calls to a "poison control center," "emergency line of a hospital," or "law enforcement agency" as being enacted to "regulate telemarketing activities and protect consumers from solicitations that cost the consumer money or imposed upon the consumers at

[4] *CBE Group* at 5.

[5] Notably, the TCPA was a merging of 2 different Senate bills proceeding on parallel courses in Congress. One (S1462) dealt with automated calls without regard to whether they were solicitations or not (other than faxes). The other (S1410) dealt with solicitations. *See* 137 Cong. Rec. S18,317 (explaining the merging of the two bills).

peculiar or inconvenient times" as CBE claims.

The intent to regulate "automated" calls regardless of whether they are made for solicitation purposes is clear from the statute. Compare 227(b)(1)(B) and 227(b)(1)(C) (which only apply to solicitations) with 227(b)(1)(A) and 227(b)(1)(D) which apply to all "automated" telephone calls. "It would also ban all automated *calls* to emergency telephone lines, cellular telephones, and paging systems. Furthermore, it would ban all unsolicited *advertising* to facsimile machines." 137 Cong. Rec. S16204 (Statement of Mr. Bentsen) (emphasis added). Congress clearly knew what it was doing.

Recitation of 227(b)(2)(B) by CBE Group and other industry commenters is a red herring. The provisions of 227(b)(2)(B) are not relevant to this matter. Those provisions permit the Commission to "exempt from the requirements of paragraph [227(b)](1)(B)" calls that meet certain conditions. Automated calls "to any telephone number assigned to a ... cellular telephone service phones" are prohibited by 227(b)(1)(A)(iii). ***The Commission is without authority to create any exemption to this provision.***

Furthermore CBE Group's reliance on legislative history is misplaced. The intent of Congress is found first and foremost in the language of the statutes that it enacts. "Congress 'says in a statute what it means and means in a statute what it says there.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254(1992)). CBE confuses legislative history regarding the portion of the TCPA that was intended to protect homes from prerecorded solicitations (227(b)(2)(B)), with the provisions that protect cell phones from all prerecorded and autodialed

calls (227(b)(2)(A)). The comments of Mr. Hollings[6] and Mr. Lent[7] cited by CBE, pertain to the former, not the latter.

The truth is, the legislative history shows that cellular telephone numbers were grouped with emergency lines at health care facilities, fire protection, and law enforcement agencies for the highest level of protection from automated calls of all types:

> Under this bill, those who use automatic dialers would be prohibited from making computer-generated calls to emergency lines at health care facilities, fire protection, or law enforcement agencies, any telephone line at a patient room in a hospital, or paging or cellular telephone numbers. 137 Cong. Rec. H11,311 (Statement of Mr. Rinaldo).
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> The Senate language has tightened up the prohibition on automatic dialing computers by completely prohibiting their use unless the FCC grants an exemption in the public interest. Such an exemption would include emergency information about natural disasters and health-related evacuations. 137 Cong. Rec. H11,313 (Statement of Mrs. Roukema).
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> This bill also allows hospitals, police stations, fire stations, and owners of paging and cellular equipment to eliminate all unsolicited calls. 137 Cong. Rec. S18,785 (Statement of Mr. Pressler).
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> S. 1462 also addresses problems arising from computerized calls. Due to advances in auto-dialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers. This results in calls to hospitals, emergency care providers, unlisted numbers, and paging and cellular equipment. 137 Cong. Rec. S18,317 (Statement of Mr. Pressler).
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> [T]hose who use automatic dialers would be prohibited from using those dialers to make computer-generated calls to emergency lines or pagers at health care facilities, fire protection, or law enforcement agencies, and any paging or cellular telephone number. 137 Cong. Rec. H10,339 (Statement of Mr. Rinaldo).
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> H.R. 1304 addresses this problem by prohibiting automatic-dialer-recorded-message players from making unsolicited calls to these emergency lines. In addition, this bill provides some relief to private consumers by prohibiting such

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[6] *CBE Group* at 6.

[7] *CBE Group* at 5.

calls to beepers and cellular phones. 137 Cong. Rec. H10,343 (Statement of Mr. Fish).

These sentiments are completely consistent with the statute, and inconsistent with the position taken by industry commenters urging denial of the Edwards Petition.

Reply to the Comments of the American Bankers Association

The comments of the American Bankers Association ("ABA") opposing the Edwards Petition illustrate the mentality of an industry that relishes the Kafkaesque world where the consumer can't win, can't break even, and the house won't let them stop playing the game. The ABA argues that "if an individual does not want to pay for debt collection calls to a wireless phone, the Fair Debt Collection Practices Act ("FDCPA") permits the consumer to send a written request for the debt collector to cease communications. 15 U.S.C. §1692c."[8] This is a deceptive misdirection, at best, and ignores millions of prerecorded calls that debt collectors make to non-debtors.

First, this provision of the FDCPA requires *written notice.* **It is impossible to send a written notice to stop making automated calls when an automated call does not identify the source of the call**. Yet debt collectors boldly state that they won't comply with the identification requirements in the law (47 U.S.C. 227(d)(3)) and the Commission's rules (47 C.F.R. § 64.1200(b)) when making prerecorded calls, because they claim that doing so, would run afoul of provisions of the FDCPA that prohibit disclosing the existence of a debt to a third party.[9]

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[8] *Comments of the ABA*, at n.10.

[9] Such a contention is absurd on its face. Suppose the debt collection industry insisted that it could not comply with the provisions of the FDCPA that prohibit disclosure of the debt to a third party, because the TCPA requires them to identify themselves in prerecorded calls. How would the Federal Trade Commission respond to such a contention? The Commission answered this question early in its administration of the TCPA: "[T]o the extent any conflicts exist [between the TCPA and FDCPA], compliance with both statutes is possible through the use of live calls." *In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, at ¶39 (1992).

Second, the "consumer" is defined by the FDCPA as "any natural person obligated or allegedly obligated to pay any debt." As has been amply demonstrated, debt collectors have an annoying habit of calling wrong numbers and calling people who have been reassigned wireless numbers who are not the debtor. Those victims of anonymous prerecorded calls have no rights under the FDCPA to stop such calls. Even those who are the debtor and who have actually granted express consent for prerecorded calls to wireless numbers and those who would have rights under the FDCPA, have no ***ability*** to stop the calls when the source of the calls is anonymous. The ***only*** protection these such victims have is the TCPA's and the prohibition on making anonymous prerecorded calls regardless of whether such calls are solicitations or not[10] and the prohibition on making any prerecorded or autodialed calls (solicitations or not) to cell phones without "prior express consent." 47 U.S.C. 227(b)(1)(A)(iii).

Illustrating the point that the TCPA is the only protection such victims have, the ABA notes that many of the entities making these debt collection calls are "not bound by the FDCPA."[11] Even if they "voluntarily" comply with the FDCPA, they (according to the ABA) do so upon receipt of a "written notice" to stop the calls – a written notice that can't be sent to an anonymous robot.

The ABA correctly points out the TCPA covers different "classes" of calls, but then it describes the authority of the Commissions incorrectly:

> Congress established a statutory framework that regulates the use of automated telephone equipment for two classes of calls—calls made to residences and calls made to wireless phones—and authorized the Commission to enact exceptions to

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[10] Provided by 47 U.S.C. 227(d)(3) and the Commission's rules at 47 C.F.R. § 64.1200(b). Notably, these provisions have no exceptions, including no exception for calls made with "prior express consent."

[11] *ABA* at n.10.

> the ban on the use of automatic dialing systems or prerecorded voice messages for calls that do not invade privacy rights.[12]

The ABA incorrectly implies that the Commission can enact exemptions to both "classes" of calls (residential and wireless). What the ABA does not point out, is that the authorization of the Commission to enact exceptions extended ***only*** to the provisions of 47 U.S.C. § 227(b)(1)(B), and that authority does not extend to the "class of calls" which is the subject of the Edwards Petition – namely the calls prohibited by 47 U.S.C. § 227(b)(1)(A)(iii) (i.e. cell phone calls). This bit of misdirection is common in many of the industry comments filed on this docket.[13]

This co-mingling of disparate provisions of the TCPA in industry comments, must be clearly and unambiguously addressed by the Commission's adjudication of the Edwards Petition. The industry has demonstrated that it can't tell them apart and any ambiguity in the Commissions' response will be exploited. Even if the Commission was to decline to grant the Edwards Petition, the Commission must make clear that the previous guidance related to automated debt collection calls is bifurcated – and different – depending on whether the discussion regards 47 U.S.C. § 227(b)(1)(A) or 47 U.S.C. § 227(b)(1)(B).

For example, the Commission has previously opined that a debtor can not terminate an EBR with the creditor as long as the debt exists, so that automated calls to a residential line made within an EBR established by a debt, can not be terminated by a request to stop such calls.[14] However, the exception for automated calls made within an EBR was created by the Commission under its authority to create exceptions to 47 U.S.C. § 227(b)(1)(B). There is no such authority

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[12] *ABA* at 2.

[13] *See, e.g., CBE Group* at 13–14.

[14] "We also note that the act of 'terminating' an established business relationship will not hinder or thwart creditors' attempts to reach debtors by telephone, to the extent that debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements." *2003 TCPA Order*, n.358.

to create an EBR exemption for automated calls to cell phones prohibited by 47 U.S.C. § 227(b)(1)(A). Thus, an EBR is not a permissible exception to 47 U.S.C. § 227(b)(1)(A)(iii).

This leaves the existence of "prior express consent" as the only exception for automated calls to cell phones under 47 U.S.C. § 227(b)(1)(A)(iii) – which is the exact subject matter of the Edwards Petition. The Commission has previously held that any "instruction[] to the contrary" is sufficient to terminate "prior express invitation or permission."[15] It is appropriate for similar request to stop such calls to have the same effect of revoking express consent, in the context of prerecorded calls. Indeed, nearly every commenter on this docket, both consumers and the industry, has stated that if the consumer wants to stop automated calls to a wireless phone, they should be able to tell them to stop. *See, also Comments of Soundbite Communications* at 2 (consumers have a "right to withdraw consent"). Thus the guidance on the EBR-based exception to calls under 47 U.S.C. § 227(b)(1)(B) does not extend to 47 U.S.C. § 227(b)(1)(A).

The ABA is correct about one thing: "the Commission [lacks] discretion to ignore the TCPA's plain language." ABA at 7. This maxim must be applied to the following facts that are not in dispute:

i. The TCPA does not permit any (solicitation or non-solicitation) autodialed or prerecorded calls to cell phones without express permission.

ii. The TCPA does not permit any prerecorded calls whatsoever that do not contain proper identification of the caller.

These are not interpretations or "good ideas" – they are inescapable truisms found in the plain language of the law and Commission's regulations.

There are no doubt, some people who have ported land-lines to a wireless service who would consent to continued automated calls from their bank or other business to whom they

[15] *In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd 8752 ¶31 (1992) (Report & Order).

previously gave consent to call that number before it was ported. There are also many people who would not feel that way. There are benefits and disadvantages to both. The Commission has already adopted "safe harbor" provisions in several areas covered by the TCPA, such as for abandons and implementing updates from the national DNC list. More importantly, the Commission has also adopted a safe harbor for automated calls to phone numbers ported to wireless devices where the call to the number while it was a land-line would have been permitted under the TCPA, but the call to the number as a wireless line would be prohibited.[16] A similar provision may be appropriate here. A limited time frame, such as 60 days, for businesses to contact their existing customers (by legal means) to obtain consent to call wireless numbers already ported may also be appropriate.

Of course, at any time banks and other businesses can contact existing customers to obtain express consent to call them at an existing number, and which can also obtain express consent to make autodialed or prerecorded calls to that number in the future if it is ported to a wireless number. The Edwards Petition is about the existence of "express consent." Since the business must 1) obtain express consent to call the telephone number of the consumer, 2) must obtain the phone number directly from the consumer, and 3) the business must maintain documentation and bears the burden of proof of both these elements, it is a simple matter for these businesses to word their consent forms so consent is given to call that number if it is ported to a cellular phone in the future. As the Commission said early in its administration of the TCPA: "[T]o the extent any conflicts exist [between the TCPA and FDCPA], compliance with both

[16] *In re Rules and Regulations Implementing the TCPA*, 19 FCC Rcd. 19,215 (2004) (Order establishing safe harbor provisions).

statutes is possible through the use of live calls."[17] The solution to the "problem" presented by the industry is in their own hands.

Respectfully Submitted, this the 13th day of April, 2009

/s/ Robert Biggerstaff
Robert Biggerstaff

[17] *In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, at ¶39 (1992) (Report and Order).